

1 Case No.: 22-CV-0382

2 Dept. No.: II

3
4 The undersigned affirms that this document
5 does not contain the social security number
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TANYA SCEIRINE
COURT ADMINISTRATOR
THIRD JUDICIAL DISTRICT
ANDREA ANDERSEN
DEPUTY

7 **IN THE THIRD JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR THE COUNTY OF LYON**

* * * * *

9 THE STATE OF NEVADA, ex rel.
10 AARON D. FORD, Attorney General
11 Of Nevada,

12 Petitioner,

13 v.

14 STUART MACKIE, an individual,
15 Respondent.
16

**ORDER DISQUALIFYING STUART
MACKIE FROM APPEARING ON ANY
BALLOT FOR ATTORNEY GENERAL**

17 On April 12, 2022, the Petitioner filed an Ex Parte Petition for Order to Show Cause
18 Regarding the Validity of the Candidacy of Stuart Mackie for Attorney General Pursuant to NRS
19 293.182 (4). The Petition alleged that the Respondent was not qualified to be elected to the
20 Office of Attorney General pursuant to NRS 228.170. NRS 228.170 was amended by the 2021
21 Legislature with the enactment of Assembly Bill 236, hereinafter referred to as the "Bill," to
22 require that a candidate for the Office of Attorney General must be a member of the Nevada State
23 Bar. The Petitioner alleged that the Respondent was not a member of the Nevada State Bar.

24 The Court issued the Order to Show Cause on April 12, 2022. A hearing occurred on
25 April 21, 2022. The Respondent appeared in proper person to respond to the Order to Show
26 Cause. He did not contest the factual issue and agreed he was not a member of the State Bar of
27 Nevada.
28

1 The Respondent argued that the recent amendment was unconstitutional as the State
2 Constitution did not require such membership. Respondent argued that the Legislature lacked
3 authority to create such a requirement. The Respondent questioned the enactment process of the
4 Bill. He did not believe that the Attorney General's Office or Legislative Counsel Bureau had
5 opined the Bill was constitutional prior to enactment. The Respondent questioned whether the
6 Bill was posted or printed as required by law.

7 The Petitioner argued that the Nevada Supreme Court has interpreted the Nevada
8 Constitution to authorize the Legislature to proscribe reasonable qualifications for constitutional
9 offices that do not conflict with the provisions existing within the Nevada Constitution. The
10 Petitioner argued that the Legislature properly utilized that authority in adding the requirement of
11 membership in the State Bar in the enactment of Assembly Bill 236 during the 2021 session.

12 The Court gave both parties an opportunity to file points and authorities by April 26,
13 2022. Both parties filed points and authorities on April 27, 2022.

14 **I. ISSUE PRESENTED**

15 Did the Legislature have authority under the State of Nevada Constitution to enact
16 legislation that would require membership in the State Bar of Nevada as a qualification for
17 the Office of Attorney General?

18 **II. FINDINGS OF LAW**

19 NRS 293.182 states in relevant part:

20 4. If the Attorney General or district attorney determines that probable cause
21 exists to support the challenge, the Attorney General or district attorney shall, not
22 later than 5 working days after receiving the challenge, petition a court of
23 competent jurisdiction to order the person to appear before the court. Upon receipt
24 of such a petition, the court shall enter an order directing the person to appear
25 before the court at a hearing, at a time and place to be fixed by the court in the
26 order, to show cause why the challenge is not valid. A certified copy of the order
27 must be served upon the person. The court shall give priority to such proceedings
28 over all other matters pending with the court, except for criminal proceedings.

5. If, at the hearing, the court determines by a preponderance of the evidence that
the challenge is valid or that the person otherwise fails to meet any qualification
required for the office pursuant to the Constitution or laws of this State, or if the
person fails to appear at the hearing, the person is subject to the provisions of NRS
293.2045.

1 NRS 293.2045 states:

2 1. In addition to any other remedy or penalty provided by law, but except as
3 otherwise provided in NRS 293.1265, if a court of competent jurisdiction finds in
4 any preelection action that a person who is a candidate for any office fails to meet
5 any qualification required for the office pursuant to the Constitution or laws of this
6 State:

7 (a) The name of the person must not appear on any ballot for the election for
8 which the person filed a declaration of candidacy, except that if the statutory
9 deadline for making changes to the ballot has passed, the provisions of subsection
10 2 apply; and

11 (b) The person is disqualified from entering upon the duties of the office for
12 which the person filed a declaration of candidacy.

13 2. If the name of a person who is disqualified from entering upon the duties
14 of an office pursuant to subsection 1 appears on a ballot for the election because
15 the statutory deadline for making changes to the ballot has passed, the appropriate
16 election officers shall post a sign at each polling place where the person's name
17 will appear on the ballot informing voters that the person is disqualified from
18 entering upon the duties of the office.

19 3. The provisions of this section apply to any preelection action brought to
20 challenge a person who is a candidate for any office on the grounds that the person
21 fails to meet any qualification required for the office pursuant to the Constitution
22 or laws of this State, including, without limitation, any action brought pursuant
23 to NRS 281.050, 293.182 or 293C.186 or any action brought for:

24 (a) Declaratory or injunctive relief pursuant to chapter 30 or 33 of NRS;

25 (b) Writ relief pursuant to chapter 34 of NRS; or

26 (c) Any other legal or equitable relief.

27 Article 5, Section 19 of the Constitution of the State of Nevada states:

28 Other state officers: Election and term of office; eligibility for office.

1. A Secretary of State, a Treasurer, a Controller, and an Attorney General,
shall be elected at the same time and places, and in the same manner as the
Governor. The term of office of each shall be the same as is prescribed for the
Governor.

2. Any elector shall be eligible to any of these offices, but no person may be
elected to any of them more than twice, or more than once if he has previously
held the office by election or appointment.

AB 236 stated:

Section 1. NRS 228.010 is hereby amended to read as follows: 228.010 No
person shall be eligible to the Office of Attorney General unless the person:

1. Has attained the age of [25] 30 years at the time of such election; [and]

2. Is a qualified elector and has been a citizen resident of this State for [2]
3 years next preceding the election [.]; and 3. Is a member of the State Bar of
Nevada in good standing.

Sec. 2. This act becomes effective upon passage and approval.

1 AB 236 was passed by the Legislature and approved by the Governor on May 29, 2021.

2 Article 3, Section 1 of the Constitution of the State of Nevada states:

3 1. The powers of the Government of the State of Nevada shall be divided
4 into three separate departments, — the Legislative, — the Executive and the
5 Judicial; and no persons charged with the exercise of powers properly belonging to
6 one of these departments shall exercise any functions, appertaining to either of the
7 others, except in the cases expressly directed or permitted in this constitution.

8 2. If the legislature authorizes the adoption of regulations by an executive
9 agency which bind persons outside the agency, the legislature may provide by law
10 for:

11 (a) The review of these regulations by a legislative agency before their
12 effective date to determine initially whether each is within the statutory authority
13 for its adoption;

14 (b) The suspension by a legislative agency of any such regulation which
15 appears to exceed that authority, until it is reviewed by a legislative body
16 composed of members of the Senate and Assembly which is authorized to act on
17 behalf of both houses of the legislature; and

18 (c) The nullification of any such regulation by a majority vote of that
19 legislative body, whether or not the regulation was suspended.

20 In *Sheriff v. Martin*, 99 Nev. 336 340 (1983) the Nevada Supreme Court held that “Acts of
21 the Legislature are presumed to be constitutional, and the party challenging an enactment bears
22 the burden of making a “clear showing” of invalidity.” Citing to *Ottenheimer v. Real Estate*
23 *Division*, 97 Nev. 314 (1981). In *Childs v. State*, 107 Nev. 584, 587 (1991), the Nevada Supreme
24 Court held that “the burden is on the challenger to make a clear showing of their
25 unconstitutionality.” Citing to *Martin*, 99 Nev. 336 (1981).

26 The Nevada Supreme Court has held:

27 In construing a constitutional provision it is the duty of the court to have recourse
28 to the whole instrument, if necessary, to ascertain the true intent and meaning of
any particular provision, and if there is an apparent repugnancy between different
provisions the court should harmonize them if possible. Frequently the meaning of
one provision of a Constitution standing by itself may be obscure or uncertain, but
is readily apparent when resort is had to other portions of the same instrument. It is
therefore an established canon of constitutional construction that no one provision
of the Constitution is to be separated from all the others, and to be considered
alone, but that all the provisions bearing upon a particular subject are to be brought
into view and to be so interpreted as to effectuate the great purposes of the
instrument.

1 *Killgrove v. Morriss*, 39 Nev. 224 226-227 (1916).

2 The Nevada Supreme Court has reviewed several cases in which the State Legislature
3 passed legislation regarding qualifications for State offices. The Court found no instances in
4 which the Nevada Supreme Court found legislation enacting qualifications and restrictions
5 unconstitutional. However, this Court could not find any cases that included restrictions other
6 than residency and age.
7

8 In *Ramsey v. City of North Las Vegas*, 133 Nev. 96,102 (2017), the Nevada Supreme
9 Court held:

10 As a result, the maxim *expressio unius est exclusio alterius* (“the expression of one
11 thing is the exclusion of another”), long adhered to in this state, instructs us to
12 view the failure to acknowledge any other existing method of removal as intent to
13 allow no other method. *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246
14 (1967) (“Every positive direction contains an implication against anything contrary
15 to it which would frustrate or disappoint the purpose of that provision.”
16 (quoting *State ex rel. Keyser v. Hallock*, 14 Nev. 202, 206 (1879) (internal
17 quotationomitted)); *see also State ex rel. Josephs v. Douglass*, 33 Nev. 82, 95, 110
18 P. 177, 181 (1910) (“We think the maxim ‘*Expressio unius est exclusio*
19 *alterius*,’ clearly applicable, and that the [C]onstitution by specifically designating
20 certain particular offices of a particular class which may be consolidated, etc.,
21 intended to exclude from such provisions all other constitutional
22 offices.”), *overruled on other grounds by State ex rel. Harvey v. Second Judicial*
23 *Dist. Court*, 117 Nev. 754, 765, 32 P.3d 1263, 1270 (2001); *Goldman v. Bryan*
24 *(II)*, 106 Nev. 30, 37, 787 P.2d 372, 377 (1990) (noting “the ‘well-recognized rule
25 that an express constitutional provision requiring a certain thing to be done in a
26 certain way is exclusive to like extent as if it had included a negative provision to
27 the effect that it may not be done in any other way’ ” (quoting *Robison v. First*
28 *Judicial Dist. Court*, 73 Nev. 169, 175, 313 P.2d 436, 440 (1957))); *State ex rel.*
O’Connell v. Slavin, 75 Wash.2d 554, 452 P.2d 943, 946 (1969) (“For purposes of
constitutional interpretation, the express mention of one thing implies the
exclusion of another which might logically have been considered at the same
time.”). Any existing authority to recall judges was thus superseded by the
centralized system to hold all judges equally accountable to the public previously
discussed.

25 In *State v. Douglas*, 33 Nev. 82, 93 (1910) the Nevada Supreme Court held that “It is well
26 settled by the courts that the Legislature, in the absence of special authorization in the
27 Constitution, is without power to abolish a constitutional office or to change, alter, or modify its
28

1 constitutional powers and functions.” The *Douglas* Court went on to further hold:

2 We think the maxim, “Expressio unius est exclusio alterius,” clearly applicable,
3 and that the Constitution by specifically designating certain particular officers of a
4 particular class which may be consolidated, etc., intended to exclude from such
5 provisions all other constitutional officers. Broom, in his Legal Maxims, says that
6 no maxim of the law is of more general and uniform application and is never more
7 applicable than in the construction and interpretation of statutes. 19 Cyc. 23. This
8 maxim is alike applicable to the construction of constitutional provisions.

9 Id. at 95. Citations omitted.

10 However in *Riter v Douglas*, 33 Nev. 400 (1910), a case decided several month prior to
11 *State v. Douglas*, the Nevada Supreme Court did not apply the maxim of “Expressio unius est
12 exclusio alterius” in considering the Legislature’s authority to alter qualifications of a
13 constitutional office. *Riter* concerned the constitutionality of a statute regarding candidate ballot
14 access and the primaries held by political parties. The *Riter* Court held:

15 The qualifications required by the primary law are not, as we view the
16 Constitution, violative of any such requirement. While citizenship, age, sex, and
17 residence enter into the qualifications made necessary by the Constitution to make
18 a legal voter, yet, in addition to these, other qualifications are essential to the
19 efficient performance of discharging the duties connected with almost every
20 office; and these additional qualifications the Legislature is privileged to impose so
21 long as they do not conflict with any constitutional requirements. For instance, for
22 certain offices qualifications are imposed by the Legislature that electors, before
23 they may become candidates for such offices, must qualify by being taxpayers or
24 by having some qualification of ability to discharge the peculiar functions of a
25 particular office. These additional qualifications imposed have been sustained on
26 innumerable occasions as no violation of the Constitution. The cases are
27 innumerable where qualifications not possessed by all electors are required of
28 candidates for office. The framers of the Constitution of our state did not intend,
when they enumerated the qualifications of every elector, to make those
qualifications the test of the eligibility of the various civil officers throughout the
state, and, except in so far as the Constitution has expressly provided the
qualifications of the various officers, the Legislature has the unquestioned right to
add additional qualifications.

32 Nev. at 436, citing to *Darrow v. People ex rel. Norris*, 8 Colo. 417, 8 Pac. 661.

33 In *Mengelkamp v List*, 88 Nev. 542 (1972), the Nevada Supreme Court upheld legislation
34 that created a one year residency requirement and minimum age of 21 years to run for the State

1 Senate or Assembly. The *Mengelkamp* Court relied upon the holding in *Riter v. Douglass*, 32
2 Nev. 400, 435 (1910) stating, “The Constitution defines the qualifications of an elector, but the
3 Legislature may prescribe reasonable qualifications for an elector who may desire to become a
4 candidate, providing such qualifications are not in conflict with some constitutional provisions.”

5
6 In *Attorney General v. Montero*, 124 Nev. 573 (2008), a candidate for district court was
7 challenged as not meeting a residency requirement established by the Legislature under NRS
8 293.1755. The candidate lived in Washoe County and sought to run for the district court office in
9 Humboldt County. NRS 293.1755 required that residency be established 30 days prior to filing.
10 The candidate did not meet that residency requirement. The Supreme Court ultimately held that
11 under NRS 293.1755 the office was a “State” office and not a “District” office by terms of the
12 same statute.

13
14 The Attorney General argued that the Constitution was silent on a residency requirement
15 for district court judges. *Id.* at 575. The *Montero* Court seemed to accept the argument and did not
16 analyze whether language in the Constitution itself supported the assertion. The *Montero* Court
17 held:

18 The residency qualification requirements for district judges outlined in NRS
19 3.060(1)(d), however, requires only that the candidate be “a bona fide resident of
20 this State for 2 years next preceding the election or appointment.” We thus
21 conclude that if the Legislature intended to require district court judicial candidates
22 to be residents of a particular district, it would have specifically imposed such a
requirement in NRS 3.060. Instead, the Legislature specifically mandated only a
two-year state residency requirement.

23 *Id.* at 577.

24 The *Montero* Court clearly did not analyze Article 6. The drafters of our State
25 Constitution did enumerate specific powers to the Legislature regarding the amendment of the
26 number and boundaries of districts in Article 6, Section 5. Article 6, Section 17 states that a
27 judicial officer cannot be absent from the State for more than ninety days. These provisions seem
28

1 to provide better support that the drafters of the State Constitution created the office in question
2 as a State office. Article 6, Section 17 clearly indicates that as long as the district judge remains in
3 the State, the office cannot be considered forfeited. It is difficult to see how the Legislature could
4 then pass legislation that would conflict with the enumerated requirement and require residency
5 within a district. The *Montero* Court did not apply the maxim of “expressio unius est exclusion
6 alterius” or follow *Mengelkamp*.
7

8 This Court notes that other states strictly interpret their constitutions and require
9 constitutional amendments to alter qualifications. For example, in *State ex rel. Sawyer*, 580 P. 2d
10 714, 717 (1978) the Arizona Supreme Court struck down enactment of a law that created an
11 additional qualification that the Arizona Attorney General must be a member of the Arizona State
12 Bar.
13

14 In *Galloway v. Truesdell*, 83 Nev. 13, 20 (1967) the Nevada Supreme Court held:

15 In addition to the constitutionally expressed powers and functions of each
16 Department, (the Legislative, the Executive, and the Judicial) each possesses
17 inherent and incidental powers that are properly termed ministerial. Ministerial
18 functions are methods of implementation to accomplish or put into effect the basic
19 function of each Department. No Department could properly function without the
20 inherent ministerial functions. Without the inherent powers of ministerial functions
21 each Department would exist in a vacuum. It would be literally helpless. It is
22 because of the inherent authority of ministerial functions that the three
23 Departments are thus linked together and able to form a co-ordinated and
24 interdependent system of government. While the Departments become a co-
25 ordinated, efficient system under such a process, yet each Department must
26 maintain its separate autonomy.

27 In *Nevada Judges Association v. Lau*, 112 Nev. 51, 56 (1996), the Nevada Supreme Court
28 cited to *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) to determine the level of scrutiny to
apply in reviewing legislation that impacts a citizen’s right to vote for the candidate of their
choice. The *Lau* Court applied the following test:

(1) the nature of the asserted injury to the protected rights; (2) the interests put
forward by the state as justification for that injury; and (3) the necessity for
imposing the burden on the petitioners' rights rather than some less restrictive

1 alternative.

2 112 Nev. at 54-55. Strict scrutiny does not apply.

3 **III. CONCLUSIONS OF LAW**

4 *Riter* and *Mengalkamp* provide mandatory precedence for this Court to follow. The issues
5 in *Riter* primarily concerned political party and independent candidate qualifications to access the
6 ballot. *Mengalkamp* concerned authority to set minimum age and residency requirements. In
7 neither case did the Legislature create a subjective skill or knowledge competency requirement an
8 elector must prove by membership in a specific organization to be eligible to hold a constitutional
9 office. However, as the broad precedence exists, this Court must follow the precedence.

10 The Court starts with a presumption that the enacted Bill is constitutional. As the
11 Respondent raised the issue regarding the constitutionality of the Bill, the Respondent carries the
12 burden of demonstrating the Bill is unconstitutional.

13 This Court cannot find on the record before it that the Legislature enacted the Bill in
14 violation of Article 4, Section 18. The Court found no authority to support the Respondent's
15 theories that a requirement exists that the Attorney General or Legislative Counsel Bureau
16 proclaim a bill constitutional before the Legislature may enact it.

17 As held in *Lau*, the Court finds that the right to seek office is not a fundamental right. As
18 held in *Riter*, the State Legislature has important interests in setting qualifications for State
19 offices. Membership in the State Bar ensures some level of understanding of Nevada law and is
20 required to practice law within the State of Nevada. The Court cannot find based upon the record
21 before it that State Bar membership is not the least restrictive method that could be used to reach
22 the Legislature's objective.

23 The Court in *Riter* opened the door for the Legislature to limit those who can qualify for
24 constitutional offices. The *Mengalkamp* Court did not inhibit how far the Legislature may open
25 the door. AB 236 walks through the open door under current precedence.

26 This Court can foresee a long parade of horrors forming behind AB 236, but that does
27 not provide a basis for the Court to invalidate the statute. Can an opponent file a Bar complaint to
28 put good standing in question? Does inactive status count? Can the Legislature next require

1 criminal litigation experience so attorneys practicing family law or transactional law need not
2 apply? E.g. *Bysiewicz v. Dinardo*, 6 A. 3d 726 (Ct. Sp. Ct. 2010).

3 Why stop with the Office of Attorney General? What would happen if the Legislature
4 were to impose mandatory retirement ages on judges and justices to deal with what the
5 Legislature deems as a recalcitrant Judiciary? Further lengthen residency requirements to prevent
6 a candidate from running for Governor? Require the Treasurer to be certified as an accountant?
7 E.g. *Reale v. Board of Real Estate Appraisers*, 880 P.2d 1205 (Col. Sp.Ct. (1994).

8 Neither party initially raised the issue as to whether the State Bar membership requirement
9 constitutes an unconstitutional delegation of authority by the Legislature to an entity that falls
10 under the aegis of the Judiciary. Both parties addressed the issue as requested by the Court.

11 The Petitioner argued in the submitted points and authorities that the Judiciary exercises
12 ministerial duties in the regulation and licensing of attorneys as held in *State v Frederick*, 129
13 Nev. 251, 255 (2013). The Court agrees that under *Galloway* the Supreme Court could find that
14 the Legislature has not delegated authority to the Judiciary to set qualifications for the Office of
15 the Attorney General.

16 Petitioner also argued correctly that as Article 5, Section 19 does not proscribe the duties
17 of the Office of Attorney General, the Legislature can set the duties for the Office. However, the
18 Court disagrees that the Legislature can require the Attorney General to personally perform the
19 duties. This argument also raises issues as to the historical definition of Attorney General at the
20 time the Constitution was drafted and what was considered the practice of law as a State Bar did
21 not exist at the time of enactment. E.g. *Bysiewicz v. Dinardo*, 6 A. 3d 726 (Ct. Sp. Ct. 2010).

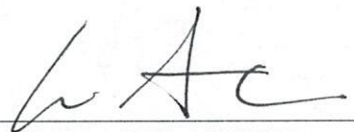
22 The Court finds that the Petitioner has proven by a preponderance of the evidence that the
23 Respondent does not meet the qualifications for the Office of Attorney General as required under
24 AB 236. The Respondent is not a member of the Nevada State Bar. The Court finds that the
25 Respondent has failed to prove AB 236 is unconstitutional under existing Supreme Court
26 precedence.

27 Based upon the above and good cause appearing **IT IS HEREBY ADJUDGED and**
28 **ORDERED** that the relief requested is **GRANTED** and the election officials shall comply with

1 NRS 293.2045. **IT IS HEREBY FURTHER ORDERED** that:

- 2 1. Election officers shall post a sign at each polling station where Stuart Mackie's name
3 will appear on the ballot informing voters that Stuart Mackie is disqualified from
4 entering upon the duties of the Office of Attorney General.
- 5 2. The Secretary of State and election officers must proceed as if Stuart Mackie is not a
6 candidate for the Office of Attorney General.

7
8 DATED this 28th day of April, 2022.



Hon. LEON ABERASTURI
DISTRICT JUDGE

1 CERTIFICATE OF SERVICE

2 I hereby certify that I, Hiedi Andersen, am an employee of the
3 Honorable Leon Aberasturi, District Judge, and that on this date, pursuant to NRCP 5(b), I
4 deposited for mailing at Yerington, Nevada, a true copy of the foregoing document addressed to:

5 Gregory D. Ott
6 Chief Deputy Attorney General
7 100 North Carson Street
8 Carson City NV 89701-4717
9 775-684-1265
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11 Stuart Mackie
12 577 Mason Road
13 Fernley NV 89408
14 775-830-1854
15 stusuem@gmail.com

16 DATED this 28th day of April, 2022.

17 Hiedi Andersen
18 Employee